FILE COPY.

Office Supreme Court, U.
FILED.
OCT 26 1906
JAMES H. McKENNE
CLE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 55.

THE SECURITY TRUST AND SAFETY VAULT COMPANY OF LEXINGTON, KY., TRUSTEE OF CLARA D. BELL, PLAINTIFF IN ERROR,

vs.

THE CITY OF LEXINGTON AND E. T. GROSS, DELINQUENT TAX COLLECTOR OF SAID CITY, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

GEO. C. WEBB,
GEO. S. SHANKLIN,
Attorneys for Defendants in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23598

(19,812.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 55.

THE SECURITY TRUST AND SAFETY VAULT COMPANY OF LEXINGTON, KENTUCKY, TRUSTEE OF CLARA D. BELL, PLAINTIFF IN ERROR,

vs.

THE CITY OF LEXINGTON AND E. T. GROSS, DELINQUENT TAX COLLECTOR OF SAID CITY, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

By leave of court we submit the following statements which were omitted from our original brief:

Although Actual Notice Was Given, No Notice is Required Prior to the Assessment of Omitted Property.

In the oral argument considerable stress was laid upon the fact that no notice was provided by the statute. In the case of Weyerhaueser *vs.* Minnesota, 176 U. S., 550-551, there is copied the statute of Minnesota providing for the assessment of undervalued property.

This statute, as the court will see, made no provision whatever for notice.

On page 553 of this case this agreed statement was made:

> "That no notice of any proceedings by any of said persons in making said re-assessment or re-valuation of said lands or in extending said taxes against said land was ever given by publication or otherwise to these defendants."

So in that case there was no notice whatever, either by statute or otherwise, given before the assessment was made.

The court said:

> "This procedure was exactly followed."

The court then held that the proceedings up to the time of the assessment were not judicial, and that the plaintiff in error was not entitled to notice.

The court then said that the provision that within twenty days after the list was published the person might question the assessment, was all that was necessary to satisfy due process of law. The plaintiff in this case had four weeks to apply to the board of equalization for relief, as hereafter shown.

In applying even that remedy, the court said:

> "And certainly, in justice or reason, a party cannot complain that when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced."

The court, after deciding the State had the right to fix the different methods of legislation, says, in Stanley *vs.* Supervisors of Albany (121 U. S., 535):

> "We hold that against an excessive valuation of property its owner had a remedy in equity to prevent the collection of the illegal excess."

And further said that a gross undervaluation was within the same principle as omitted property.

Under the Weyerhaueser case, we submit there was due process of law in this proceeding.

Direct Issue Made as to Opportunity to be Heard.

The statement was made by counsel that the allegation that plaintiff had not had opportunity for hearing was not denied. This is incorrect, for on page 28 of the record, near the middle of the paragraph, defendants distinctly alleged *"that ample time and opportunity was afforded plaintiff to show whether said property had been omitted or not from said yearly assessments."* So the issue upon this point was sharply made, and no proof offered by the plaintiff in support of its side.

Questions upon Which the Findings of the State Court are Conclusive.

That all question as to the form of the proceeding is conclusively settled by the State court is sustained in Palmer *vs.* McMahon (133 U. S., 665), where the court, by the Chief Justice, said:

> "We are bound by the decision of the Court of Appeals of the State of New York adversely to the plaintiff in error as to the failure to comply with the statute in relation to the method of procedure, form of assessment, oath of assessors," etc.

That the finding of the State court as a fact that notice had been given is conclusive upon this court is sustained by the statement in the case of Stanley *vs.* Supervisors of Albany (121 U. S., 547), where the court said:

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here, it matters not how convincing the argument that upon the evidence the finding should have been different."

An Actual Hearing as to Values Was Had in this Suit.

The Fayette circuit court did in this case pass upon the question of values of the omitted property.

Issue as to values was tendered by defendants (Record, pp. 22 and 23). Plaintiff denied values (Record, pp. 39 and 40). The court heard proof on values. (See deposition of Vaughn, Record, pp. 73 to 79.)

The court determined values from the evidence before it. (See last paragraph of p. 98 and pp. 99 to 102 of Record.)

This finding was approved and affirmed by Kentucky Court of Appeals.

That was certainly due process of law, even on the contention as to values.

Opportunity for Hearing by the Board of Equalization and Complete Relief is Given by Section 3181 of the Statute.

Under the constitution of Kentucky, the city of Lexington is a city of the second class, and the entire charter and organic law for the city of Lexington is contained in the General Statutes of Kentucky. Sections 3174 to 3189 embrace all of the sections which relate to revenue and taxation. Of these sections, sections 3179 to 3182, inclusive, embrace the whole law as to assessments and the review of assessments by the board of equalization. A copy of these sections is filed with this brief as Appendix B. Section 3179 prescribes the kind of notice and method of original assessment, and also as a part of it embraces the assessment of omitted property. This is all contained in one section, as a part of one enactment, and forms an entity in the statute, and cannot be separated into two separate statutes, as has been attempted in the oral argument in this case.

The assessment of omitted property, therefore, has all of the safeguards as to notice and opportunity to be heard

given by this statute in case of original assessment, and section 3181, providing for a board of equalization, is a part of the scheme of taxation as to omitted property.

Section 3181 provides for a board of equalization, to consist of three citizens, who shall be selected by the mayor, with the consent of the general council, and we call especial attention to the following portions of that section:

> "Such board shall be paid such compensation as may by ordinance be fixed, and shall meet at a suitable place to be provided by the city *on the first Monday in January of each year.* * * * The assessor shall be in constant attendance on said board and shall furnish them all information he can. They shall have power to cause all city records to be brought to them for their inspection by the custodian thereof, and if it be necessary to retain them for defense, may do so by receipting therefor to the custodian thereof. * * * *They shall hear all complaints against the assessment made by the assessor, and shall determine the same.* They shall increase or decrease assessments on like property to make all assessments as uniform as may be; are to place a true value on the property assessed; but no increase shall be made without notice to the person whose property is to be increased. * * * Said board shall remain in session as long as the business may require, but not to exceed four weeks" (Appendix B).

The powers of this board are ample for all purposes of review, and the taxpayer has the right to be fully heard as to any complaints he may have to make as to the method and manner of assessment, and for a full and complete hearing as to values fixed in the assessment, which values they may increase or decrease, as may be found necessary to conform to the requirement of this statute for the true cash value of the property assessed.

The assessment complained of by plaintiff in error was made on December 31, 1898. The board of equalization met on the following Monday, and continued in session for four

weeks. On December 31 the back-tax collector levied his writ, and took no further steps. On the 3d of February following plaintiff in error brought this suit and enjoined the collection of the tax.

Although plaintiff had the right to a review of the assessment before the board of equalization during four weeks in January, 1899, it made no application to that board, and after the board had adjourned, on the 3d of February resorted to injunction. Plaintiff had the option to either go before the board of equalization and make its complaint or to make it in this injunction proceeding. Both methods were provided by the Kentucky law. Its reason for electing to enjoin is apparent from the facts disclosed in this suit. It was conscious of having withheld from the city a large part of its property, which was unquestionably subject to taxation, and further knew that on the merits they could make no showing which would enable them to escape with their unlawful gains.

The claim made by plaintiff that it was precluded from having the assessment reviewed by reason of the levy is absolutely untenable. Plaintiff has insisted throughout this case that an assessment was absolutely indispensable as the basis for any tax. Had it appealed to the board of equalization and the board had sustained their contention that they were not liable for assessment for omitted property, the assessment would have been destroyed and the levy rendered a nullity.

That the plaintiff in error had a right to a hearing before the board of equalization is conceded by it in its original brief (pages 21-22) in the following statement:

> "We have not thought it incumbent on us to determine the question which may be made on this statute, whether the provision just quoted was intended to stand alone as to the assessment of omitted property; or whether it was intended that the action of the assessor should go through the same forms and be subjected to the same processes to ascertain its just-

> ness and correctness, including the board of review and other provisions to secure a proper result, as is provided in the case of original assessments. If we should pass an opinion on that point, we should be disposed to say that the statute intends that the act of the assessor in assessing property omitted for former years should be subjected to the same scrutiny, and should go through the same forms as is provided in the case of original assessments."

It is directly charged in the answer that the plaintiff had full opportunity for hearing, and the above statute supplies one of the opportunities referred to. The fact that the plaintiff in error did not apply to the board under this method makes no difference, as decided in the case of Stanley *vs.* Board of Supervisors (121 U. S., 535), where the court says:

> "Plaintiff below did not think proper to resort to this method of obtaining relief, which would have given him all he was entitled to." * * *

The plaintiff in error seeks to avoid the effect of its failure to apply to the board for the relief by citing section 4189 of the Kentucky statutes. This position cannot be sustained for these reasons:

1st. Section 4189 is not part of the charter, but is part of the provision for attachment by the sheriff to collect State and county taxes.

2d. Section 3188 in the charter only adds the right to collect by attachment to the right to enforce the lien by suit, and to distrain by the tax collector, the methods of collection which are expressly provided in the charter. It in nowise superseded the methods and means provided in the charter for collecting taxes.

3d. Under section 4189 the only defense excluded is that of defective assessment. It expressly permits the taxpayer to show that the property has never been assessed. This is the exact defense offered by plaintiff in this suit, the sole basis of its claim.

Section 4189, so far from affecting the right of hearing before the board of equalization, provided for an additional hearing before a court of law.

Surely the right to a hearing before such board, the right to be heard before the court in an attachment suit, and the right to relief by injunction are sufficient to constitute due process of law.

As stated in Davidson *vs.* New Orleans (96 U. S., 105), there appears to be a strange misconception of the scope of the provision as found in the fourteenth amendment, and it would seem from many of the cases and the arguments made in them that the clause under consideration is looked upon as a means of bringing to the test of the decisions of this court the abstract opinions of every unsuccessful litigant in a State court of justice of the decision against him and of the merits of the legislation on which such a decision may be founded.

And the court holds in that case:

> "It is not possible to hold that a party has without due process of law been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of procedure applicable to such case."

Without regard to the notice given in this case, if, as held in the Weyerhauser case, no notice by statute or otherwise is necessary before assessment; and if, as held in other cases, a hearing, either before a board of review or court of justice, after assessment is sufficient, what escape can there be from the conclusion that there has been due process of law?

Respectfully submitted,

GEORGE C. WEBB,
GEORGE S. SHANKLIN,
Attorneys for Defendants in Error.

APPENDIX B.

SECTION 3179. *"Assessor to Give Notice—Oath—Office Hours—Blanks—Failure to Give List—Penalty—Other Duties.*—On or before the first day of September in each year the assessor shall give public notice, by advertisement in the official newspaper of the city and by handbills posted through the city, that all persons owning or having in their possession or under their control as agent, guardian, committee, executor, administrator, curator, trustee, receiver, commissioner or otherwise, tangible or intangible personal property on the fifteenth day of September following, are required, on or before the first day of October, to give him a true and complete list of the same, with true cash value thereof, as of the fifteenth day of September, under oath, upon forms to be furnished on application by said assessor at his office, and that all merchants in the city, doing business for themselves or others, shall, in like manner, in addition thereto, state the highest amount in value of all goods, wares, merchandise owned or kept on hand for sale by said merchants during the three months next preceding such fifteenth day of September. The assessor and his deputies shall be authorized to administer oaths and affirmations, and may examine, on oath any person touching his personal property, and the value thereof, and may examine merchants on oath as to the statements they are required to make. The assessor shall keep his office open, and be himself or have a deputy in attendance during the hours from eight a. m. to six p. m., or such other or additional hours as may by ordinance be fixed, from the fifteenth day of September to and including the first day of October, excepting Sundays and legal holidays. The assessor shall constantly keep on hand, and furnish to persons lawfully requiring the same, all necessary blanks and forms for the lists and statements required by this act. Nothing herein shall, however, prevent the assessor from assessing from the best information he can gather; and where an assessment has been made against a person who has had actual notice to appear and list his property or make statements thereof and fails to to do so, the same shall not be decreased, but may be increased by the board of equalization. If any person refuse to attend when summoned, or to be sworn to answer, or to

answer any question propounded to him by the assessor or his deputy, the assessor or deputy may, in writing, under oath, state the question, the refusal to answer it, and ask the police judge to issue a warrant against such person; and if the question appear to be a proper one, the said judge shall issue a warrant, and the said person shall, on conviction of having refused to answer the question, it being found by the court to be a proper one, be fined ten dollars, and there compelled by process of contempt to answer the question and such proper questions as the assessor may propound to him. The assessor shall assess personal property in a separate book, in which he shall separate tangible from intangible property. The word person as used herein shall mean natural and artificial persons, and the duties enjoined on them shall in the case of artificial persons, be performed by the chief officer or agent in the city at the time. Whenever the assessor shall ascertain that there has, in any former year or years been any property omitted which should have been taxed, he shall assess the same against the person who should have been assessed with it, if living, if not, against his representative."

SECTION 3180. *"Assessment Books to be Returned to Auditor.*—On or before the first of December in each year the assessor shall return to the auditor his assessment books, certified by him to be a full, careful and honest assessment of all property within the corporate limits of the city subject to assessment; and he shall take the auditor's receipt therefor in duplicate, one of which he shall transmit to each board of the general council at its first regular meeting in December. All said books and said reports shall remain in the auditor's office, subject to the inspection of the public, until they shall be transmitted to the board of equalization as hereinafter provided."

SECTION 3181. *"Board of Equalization—Qualifications—Compensation—Chairman and Clerk—General Powers and Duties.*—There shall be a board of equalization, to consist of three citizens, who shall be selected by the mayor with the consent of the general council. No person shall be selected as a member of said board who shall not at the time be a housekeeper and owner of real estate of the city, and shall not have been a resident thereof for five years next preceding his election. Said board shall be paid such compensation as may, by ordinance, be fixed, and shall meet at a suitable place

to be provided by the city, on the first Monday in January of each year. They shall first be duly sworn to faithfully discharge their duties, shall elect from among themselves a chairman and a clerk, and shall then notify the auditor that they are ready to receive the assessment books, etc., which the auditor shall deliver to them, taking his receipt therefor. The assessor shall be in constant attendance on said board, and shall furnish them all information he can. They shall have power to cause all city records to be brought to them for their inspection by the custodian thereof, and if it be necessary to retain them for defense, may do so by receipting therefor to the custodian thereof. They may also interrogate any city official, who shall at their request attend them and respond to all questions. They shall have power to administer oaths, and they shall have power to compel the attendance of witnesses; and all persons who shall refuse to attend them or to be sworn by them, or refuse to answer any question, shall be subject to the same penalties as provided for like refusal to the assessor. They shall first compare his real estate book with the plat books in the auditor's office, and see that every parcel of real estate in the city has been assessed, and if they find that any has been omitted, shall certify the same, giving the number of parcels omitted to the city solicitor, who shall enforce the penalty provided in section three thousand one hundred and seventy-seven against the assessor for so doing, and they shall assess the parcels omitted. They shall hear all complaints against the assessment made by the assessor, and shall determine the same. They shall increase or decrease assessments on like property, to make all assessments as uniform as may be, or to place a true value on the property assessed; but no increase shall be made without notice to the person whose property is to be increased, and they may, in the assessment of real estate, increase or decrease all assessments uniformly by adding or subtracting a percentage of the assessments, and a notice of such increase need not be given except by publication in the official paper of the city. Said board shall remain in session as long as the business may require, but not to exceed four weeks. Three members shall constitute a quorum, and a majority of a quorum may determine any question before it. No change in any assessment shall be made by erasure, but there shall be appropriate columns for all changes and additions, and same shall be made in a different colored ink

to that which the assessor has used. When said board shall have completed its labors, it shall prepare a statement of the gross assessment of real property and the gross assessment of personal property, and the sum thereof, and also showing the increase or decrease, if any, in the total assessment made by them, under their signatures, which they shall return to the auditor with all the assessment books, plats and papers received from him, taking his receipt for the same, which they shall transmit to the board of councilmen."

SECTION 3182. "*Auditor to Verify Assessment Books—Proceeding if Mistake Found.*—The auditor shall carefully verify the statement of the board of equalization, and the assessment books returned, and if it be correct, he shall certify the same. If, however, he finds a mistake, he shall cause said equalization board to meet, and together they shall ascertain the correct amount, and the certificate of the board, indorsed by the auditor as correct, shall by him, at the first meeting in March in each year, be transmitted to the board of councilmen as a basis on which they shall predicate the annual levy ordinance."